State of New Hampshire

OFFICE OF ATTORNEY-GENERAL

COPY from

1958

December 5

Mr. Paul E. Farnum
Deputy Commissioner of Education
State House Annex
Concord, New Hampshire

Dear Mr. Farnum:

This is in reply to your letter of November 21, 1958, in which you request our opinion as to whether any liability might be found to rest with an individual member of a student safety patrol, with some member of the school staff, or with the school board, for accidental injuries sustained by a pupil who is a member of a group of children walking along a sidewalk, when the safety patrol member has been assigned to direct the group during its travels from one point to another several blocks away.

Although its text goes beyond the scope of your specific inquiry, we are enclosing herewith a photostatic copy of an excellent opinion by former Attorney General Thomas P. Cheney, dated May 7, 1937, addressed to former Commissioner of Education James N. Pringle. It discusses in detail the liability of school districts, school boards, schoolteachers, and private owners of school transportation vehicles for accidental injuries to pupils.

The first part of the Cheney opinion deals with the liability of school districts and states in substance that a school district, as a political subdivision of the State performing governmental functions, is immune from suit because of the principle that the State may not be sued without its consent. Although your letter raised no question concerning the civil liability of school districts we feel we would be remiss if we did not point out that Mr. Cheney's statement is no longer true in all cases because of RSA 412:3 which became effective August 1, 1951, and which provides as follows:

COPY

> "412:3 Procured by Governmental Agency. It shall be lawful for the state or any municipal subdivision thereof, including any county, city, town, school district or other district, to procure the policies or insurance described in section 1 of this chapter. In any action against the state or any municipal subdivision thereof to enforce liability on account of a risk so insured against, the insuring company or state or municipal subdivision thereof, shall not be allowed to plead as a defense immunity from liability for damages resulting from the performance of governmental functions, and its liability shall be determined as in the case of a private corporation. Provided, however, that liability in any such case shall not exceed the limits of coverage specified in the policy of insurance, and the court shall abate any verdict in any such action to the extent that it exceeds such policy limit."

Thus, school districts which procure liability insurance policies may now be sued and compelled to pay money damages to injured parties if liability is found to exist on account of an insured risk but in no event shall liability exceed the limits of coverage of the policy.

With respect to the liability of the school board, or some member of the school staff, for accidental injury to a pupil in the circumstances described in your letter we incorporate herein by reference the language contained in the Cheney opinion under the headings "Liability of School Boards" and "Liability of Teachers". In brief, the school board could not be found liable in the absence of a showing of bad faith on the part of its members while an injured pupil could recover from a member of the school staff only upon a showing that his injuries resulted from the failure of the staff member in question to exercise due care in selecting the route of travel and/or a student safety member to supervise the group and a further showing that the student's injuries were not caused in any degree by his own failure to exercise due care.

The individual safety patrol member, like the teacher, has a duty to exercise due care to prevent pupils under his supervision from being injured as a result of his acts or failure to act and he may be held liable if his lack of due care causes injury to a pupil and if the injured pupil has not, through his own failure to exercise due care, contributed to his own injury. The safety patrol member may be held liable under such circumstances even though he may be a pupil and a minor for it is well established that infants are liable for their own failure to exercise due care in the same manner as adults. Stearns v. Wallace, 59 N.H. 595, Smith v. Bailey, 91 N.H. 507.

While infants are held to the same standard of care as are adults, infancy and lack of experience are factors which may be taken into consideration by the judge or jury, whichever is the trier

Hampshire
ATTORNEY-GENERAL

COPY

of fact in any given case, in determining whether or not the conduct of the child in question measures up to the standard. Charbonneau v. MacRury, 84 N.H. 501.

A parent is not vicariously responsible for the negligent acts or failure to act of his minor child unless at the time of the negligent act or failure to act the child was acting as agent of his parent. Since, in most instances, children of school age are without substantial funds of their own it would seem that the possibilities of a lawsuit against a student safety patrol member would be quite remote. Conceivably, there could be cases where the safety patrol member is covered by a comprehensible liability insurance policy, and, of course, in such cases the likelihood of a lawsuit would be much greater.

It is impossible to give a simple yes or no answer to your inquiry as liability in any given case must ultimately be determined by the court or jury. I trust, however, that the legal principles set forth herein and in Mr. Cheney's opinion will be of some assistance to you.

Very truly yours,

George T. Ray, Jr.
Assistant Attorney General

GTR,Jr/lt